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VICIOUS CIRCLES IN THE LOUISIANA
LAW OF PRIVILEGES

Joseph Dainow*

I.

Privileges or preferences among creditors constitute a kind of security device because the privileged or preferred creditors are not subjected to the general rule of proration but are paid in full before ordinary creditors get anything.¹ When two or more privileged creditors are in competition, the Civil Code stipulates that there is also a ranking or priority among them;² they do not rank concurrently except when the competing privileges are of the same nature or when concurrence is expressly provided.³ The subject matter of privileges is *stricti juris*, and therefore there must be a written text of law to support the creation and existence of each privilege,⁴ and there must also be an express text as authority for each ranking question as between privileges.⁵ Furthermore, by reason of the *stricti juris*

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1. LA. CIVIL CODE art. 3183 (1870): "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."

Id. art. 3184: "Lawful causes of preference are privilege and mortgages."

In Louisiana law and usage, the words "privilege" and "lien" are often used interchangeably.

2. *Id.* art. 3187: "Among creditors who are privileged, the preference is settled by the different nature of their privileges."

3. *Id.* art. 3188: "The creditors who are in the same rank of privileges, are paid in concurrence, that is on an equal footing." See also LA. R.S. 9:4809; 9:4521(1); 9:4521(4) (1950).

4. LA. CIVIL CODE art. 3185 (1870): "Privilege can be claimed only for those debts to which it is expressly granted in this Code." There must, of course, be understood the addition "and by statute." See LA. R.S. 9:4501-4503 (1950).

"No consideration of equity can enter into the determination of the right of privilege." *Boylan's Detective Agency v. Arthur Brown & Co.*, 157 La. 325, 102 So. 417 (1924). See also *State ex rel. Metropolitan Land Co. v. Recorder of Mortgages*, 166 La. 271, 117 So. 145 (1928); *In re Employer's Liab. Assur. Corp.*, 180 La. 406, 156 So. 447 (1934); *Boone v. Brown*, 201 La. 917, 10 So. 2d 701 (1942); *City of Alexandria v. Shevvin*, 240 La. 983, 126 So. 2d 336 (1961).

5. *E.g.*, LA. CIVIL CODE arts. 3191, 3251, 3254-3270 (1870). No distinction

nature of the subject, it is not appropriate in this discussion⁶ to reopen any of the policy considerations which went into the creation of the privilege or into the rules of ranking among privileges.⁷

However, for our frustration, the lawmakers have never tried to envisage the whole picture of rankings, so that there is an accumulation of piecemeal or partial sets of rules which do not constitute a coherent framework. Any effort to formulate a single, comprehensive order of ranking among existing privileges must fail because this is impossible. Furthermore, as a result of the separate, legal texts concerning the rankings among separate pairs or groups of privileges, there have developed the so-called "vicious circles," where privilege *A* primes privilege *B*, privilege *B* primes privilege *C*, and privilege *C* primes privilege *A*.

The general attitude in the legal profession has seemed to be that there is no way out of these vicious circles and that the important thing is to be able to identify such situations in order to know when to litigate and when to compromise (*pro rata*). Such a compromise does not resolve the legal issues involved, and it may be questioned whether this estimate of the situation is correct; there is reaction against the idea of a legal problem which defies solution.⁸ There is need for legislative clarification of rules and policies, but a realistic appraisal of such a possibility is not an optimistic one. The present article is an inquiry into this problem, and contains some proposed solutions in accordance with existing law.

II.

It is customary to start work on a problem by examining the existing general rules and principles and the jurisprudence (decided cases). As to the latter, a search has not uncovered any

is drawn between the code or statutory formulas: "... primes all other privileges except . . .", "... yields only to . . .", "paid in preference to all other debts except . . .", and so forth.

Analogy, syllogism, and even the argument *a fortiori* are absolutely excluded and inapplicable. See Succession of Hardy, 11 La. App. 239, 122 So. 154 (1st Cir. 1929).

6. With the exception of the case described in the text accompanying note 46 *infra*.

7. *E.g.*, Fisk v. Moores, 11 Rob. 279 (La. 1845).

8. *Of* GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (An English translation by La. State Law Institute) 454-57, 460, 564, §§ 185, 187, 223 (1963).

judicial decision in Louisiana which has dealt squarely with the disentanglement of a vicious circle in the ranking of privileges. The probability of such occurrence is not high, since attorneys would recommend compromise; usually, the sums involved would not be substantial enough to support expensive litigation. Consequently, there is no help from that source.

As to the general rules and principles, there is some guidance and a means of conflict-avoidance, in the Civil Code express ranking provisions for all the general privileges⁹ and in the rule that the general privileges which affect both movables and immovables should first be paid from available movables.¹⁰

The Civil Code also contains some express provisions for resolving conflicts between special privileges.¹¹ Another rule is that, unless the specific conflict is expressly provided for,¹² special privileges come ahead of the general privileges.¹³

There is also the rule of statutory construction *specialia generalibus derogant*, which reconciles a conflict by giving effect to the special law (regardless of enactment date) as an exception to the general law,¹⁴ and this also applies to the ranking of privileges.¹⁵

In addition, a most helpful rule for the ranking of privileges is the settled rule of statutory construction that, in the event of irreconcilable¹⁶ conflict between two legislative texts, the

9. LA. CIVIL CODE arts. 3191, 3252 (1870).

10. *Id.* arts. 3253, 3266, 3269.

11. *Id.* arts. 3255-3269.

12. *E.g.*, the special privilege of the lessor is primed by the general privileges for law costs (*id.* art. 3256) and funeral expenses (*id.* art. 3257).

13. *Id.* arts. 3254, 3255, 3269, 3270. See also Dainow, *Article 3267 and the Ranking of Privileges*, 9 LA. L. REV. 370 (1949).

14. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5024 (3d ed. 1943 by Horack, and 1964 supp. by Sands) [hereinafter cited as SUTHERLAND]; CRAWFORD, THE CONSTRUCTION OF STATUTES § 167 (1940) [hereinafter cited as CRAWFORD]; Chappuis v. Reggie, 222 La. 35, 43, 62 So.2d 92, 95 (1952), and *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Legislation*, 14 LA. L. REV. 92-94 (1953); Hewitt v. Webster, 118 So.2d 688 (La. App. 2d Cir. 1960); Lelong v. Sutherland, 134 So.2d 627 (La. App. 4th Cir. 1961); State v. St. John the Baptist Parish School Board, 135 So.2d 665 (La. App. 4th Cir. 1961).

15. *Japote v. Libby*, 114 La. 570, 38 So. 457 (1905). The priority over the lessor which LA. CIVIL CODE art. 3259 (par. 2) (1870) gives to the unpaid vendor of "farming utensils" is treated as a special rule by way of exception to the general rule in *id.* art. 3263, which gives the lessor preference over the vendor. In this way, both provisions are given effect.

16. First, it is fundamental that every effort should be made to reconcile and harmonize different enactments so as to give effect to all legislation; however, this is not always possible, and consequently there is need for a rule to deal with the irreconcilable conflict. LA. CIVIL CODE arts. 17, 23 (1870); SUTHERLAND

later expression prevails over the earlier one.¹⁷

In the Civil Code and in the statutes, there are a great many texts which fix the rankings of privileges, and there is no need to linger over these. In the absence of express provision, the conflict between any *two* competing privileges can be resolved by one or a combination of these rules or guiding principles.

When *three* or more competing privileges come together in certain combinations, the applicable ranking provisions sometimes create a "vicious circle."¹⁸ It is now our purpose to examine some specific instances of such vicious circles, and to propose a basis for their resolution.

III.

Vicious circles involve the conflicting sources of law in various combinations: Civil Code versus chattel mortgage law; Civil Code versus other statutes; conflicts within the Civil Code; conflicts between statutes (other than the Civil Code); combinations of any of these. Under the Civil Code and in some statutes, ranking is based on the nature of the privileges;¹⁹ the chattel mortgage law establishes a chronological basis for ranking;²⁰ some statutes use both criteria.²¹ The following are some illustrative vicious circles.

§ 3711; CRAWFORD § 325; *Lewis Hardware Co v. Gremillion*, 65 So.2d 807 (La. App. 4th Cir. 1953).

17. See SUTHERLAND §§ 2003, 2012, 2014, 2016; CRAWFORD §§ 137, 160, 166; *State v. Board of Comm'rs of Caddo Levee Dist.*, 188 La. 1, 175 So. 678 (1937); *Fullilove v. United States Cas. Co. of N. Y.*, 129 So.2d 816 (La. App. 2d Cir. 1961).

See also (even as to inadvertent changes) *City of Alexandria v. LeCombe*, 220 La. 618, 57 So.2d 206 (1952); *New Orleans Opera Guild, Inc. v. Local 174, Musicians Mutual Protective Union*, 242 La. 134, 150, 134 So.2d 901, 907 (1961).

The rule of later legislation is often based on the concept of an implied repeal of the earlier enactment with which it conflicts. *Cf.* LA. CIVIL CODE arts. 22, 23 (1870). Whereas an express repeal removes the earlier law from the books, so to speak, an implied repeal has a more flexible scope of operation. The implied repeal may range from the same total effect as an express repeal to the much lesser effect of repealing only those parts with which there is irreconcilable conflict, or the still lesser effect of merely superseding the earlier legislation in those situations where it is in irreconcilable conflict with the later legislation while leaving the earlier enactment fully effective and operative for all situations which do not at the same time involve the more recent law. In this case, where the later legislation *prevails* only *pro hoc vice*, it may be too strong a statement to say that the earlier law is "repealed." See *Gorham v. Mathieson Alkali Works, Inc.*, 210 La. 462, 27 So.2d 299 (1946).

18. In common law jurisdictions, the phrase "circuity of liens" is less emotive but more descriptive.

19. LA. CIVIL CODE art. 3187 (1870).

20. LA. R.S. 9:5354 (1950) (as last amended by La. Acts 1954, No. 481, § 1); and LA. R.S. 32:710B (1950).

21. *E.g.*, LA. R.S. 9:4501, 9:4502 (1950).

A. Civil Code versus Chattel Mortgage Law

A classical instance of a vicious circle is the case of a person who purchases an item on credit, and then has a duly-recorded chattel mortgage placed on it before he brings it onto his leased premises. The vendor's privilege primes the chattel mortgage, and the chattel mortgage primes the lessor's privilege, but the lessor primes the vendor. Each element of this vicious circle is based on an express text of law, so that policy arguments are inappropriate, and in any event they would merely rephrase the same vicious circle in different words. The supporting legal texts are the chattel mortgage act, R.S. 9:5354 (chattel mortgage primes all privileges "arising subsequently thereto"),²² and Civil Code article 3263 (lessor primes vendor).²³ However, the authority of these legislative sources is not the same because the chattel mortgage act is the later of the two. According to its ranking provision, the chattel mortgage yields to a prior vendor's privilege but primes a subsequent lessor's privilege. Thus, the application of the chattel mortgage statute to the facts of the illustrative case results in the following order of ranking: (1) vendor's privilege, (2) chattel mortgage, (3) lessor's privilege.

The Civil Code provision places the lessor ahead of the vendor, and this is of course still good law when these two alone are in competition; but when there is also a chattel mortgage subsequent to the vendor's privilege and prior to the lessor's, it requires the application of the chattel mortgage statute, and this later legislation prevails as the authority for the ranking. This statute establishes a chronological basis for the competition of other privileges with the chattel mortgage,²⁴ as distinguished from the Civil Code ranking on the basis of the nature of the privileged debt regardless of the chronological order of dates of creation. If the vendor's and lessor's privileges both arose prior to or subsequent to the chattel mortgage, there

22. *Id.* 9:5354 (as last amended by La. Acts 1954, No. 481, § 1): "Every such mortgage shall be effective as against third persons from the time of filing in the proper offices, and the filing shall be notice to all parties of the existence of the mortgage, which shall be superior in rank to any privilege or preference arising subsequently thereto. . . ."

23. LA. CIVIL CODE art. 3263 (1870): "The privilege of the vendor on movables sold by him, which are still in the possession of the vendee, yields to that of the owner of the house or farm which they serve to furnish or supply, for his rents. It yields also to the charges for affixing seals and making inventories, but not to the funeral or other expenses of the debtor."

24. See Dainow, *Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law*, 13 LA. L. REV. 537, 542 (1953).

would be no conflict between the code article and the chattel mortgage law, so that full effect could be given to both ranking provisions.

B. Civil Code versus Statute

Another kind of statutory interference with the code system of ranking privileges is found in the garageman's lien statute.²⁵ According to this statute, the unpaid mechanic (within ninety days of the repair job) has a privilege which yields to the vendor's privilege, but not to the lessor. As the Civil Code places the lessor ahead of the vendor, the following vicious circle is presented: the vendor primes the mechanic, who primes the lessor; and the lessor in turn primes the vendor.²⁶ Since the statute is the later legislation, the application of its rules to our problem results in the following ranking: (1) vendor's privilege; (2) mechanic's privilege; (3) lessor's privilege.

C. Amended versus Unamended Civil Code Articles

1. The competition between a conventional mortgage,²⁷ a widow's homestead privilege, and a privilege for funeral charges involves a conflict between the ranking provisions of article 3252 (widow yields to mortgage but not to funeral charges) and article 3186 (privilege for funeral charges primes conventional mortgage²⁸), and presents this vicious circle: mortgage primes widow primes funeral charges primes mortgage. However, article 3252 was amended in 1918 so that its text is of later legislative vintage than the 1870 text of article 3186. This later legislation of the amended article 3252 produces the following result as to ranking: (1) conventional mortgage, (2) widow's homestead, (3) funeral charges.

2. If, in competition with a widow's homestead privilege, there is a vendor and a lessor, this presents another vicious cir-

25. LA. R.S. 9:4501 (1950), as amended by La. Acts 1960, No. 31, § 1: " . . . This privilege has no effect against a vendor's privilege, a chattel mortgage previously recorded, or against a bona fide purchaser to whom possession has been delivered and who has paid the purchase price without previous notice of the existence of the privilege."

26. LA. CIVIL CODE art. 3263 (1870).

27. Although mortgage is a preference, it is not technically a privilege, but this case is included, in connection with the case which follows, to show the impossibility of splitting up article 3252 on the basis of the part (*re mortgage*) which was added in 1918.

28. *Alter v. O'Brien*, 31 La. Ann. 452 (1879); *Succession of Hardy*, 11 La. App. 239, 122 So. 154 (1st Cir. 1929); *Home Owner's Loan Corp. v. Succession of Brooks*, 180 So. 170 (La. App. 2d Cir. 1938).

cle in that the vendor primes the widow,²⁹ who primes the lessor,³⁰ who in turn primes the vendor.³¹ The widow's homestead is dealt with in Civil Code articles 3252 and 3254, but article 3252 is to be used because its 1918 amendment gives it a later date of enactment than the 1870 text of article 3254. Furthermore, the 1918 amendment of article 3252³² prevails over the unamended ranking provision of article 3263, by which lessor primes vendor, so that the ranking solution is: (1) vendor, (2) widow's homestead, (3) lessor.

3. Another vicious circle of this kind is presented by the competition between the privilege of a depositor, which takes preference over the privilege for funeral expenses,³³ which primes the lessor,³⁴ who has a preference over the depositor (if other movables are insufficient and lessor had no knowledge that things did not belong to his tenant).³⁵ Of the three texts involved, article 3260, being amended in 1871, is the latest expression of the legislature and produces the following result: (1) lessor, (2) depositor, (3) funeral expenses.

29. LA. CIVIL CODE art. 3252 (1870): ". . . Whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, and not possess in their own rights property to the amount of One Thousand Dollars, the widow or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased husband or father, a sum which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars, and which amount shall be paid in preference to all other debts, except those secured by the vendor's privilege on both movables and immovables, conventional mortgages, and expenses incurred in selling the property"

30. *Ibid.*

31. LA. CIVIL CODE art. 3263 (1870).

32. Even though the 1918 amendment made no change in those parts of the text which concern the parties here involved, this date of enactment applies to the entire text of the article, which, as a whole, was amended and reenacted at that time. See note 27 *supra*.

33. LA. CIVIL CODE art. 3261 (1870): "With the exception stated in the foregoing article, the privilege of the depositor on the thing deposited is not preceded by any other privileged debt, even funeral expenses, unless it be that the depositor must contribute to the expense of sealing and making inventory, because this expense is necessary to the preservation of the deposit."

34. *Id.* art. 3257: "The case is the same with respect to the funeral expenses of the debtor and his family; when there is no other source from which they can be paid, they have a preference over the debt for rent or hire, on the price of the movables contained in the house or on the farm."

35. *Id.* art. 3260, as amended by La. Acts 1871, No. 87: "If, among the movables with which the house or farm, or any other thing subject to the lessor's privilege, is provided, there should be some which were deposited by a third person in the hands of the lessor [lessee] or farmer, the lessor shall have a preference over the depositary [depositor] on the things deposited for the payment of his rent, if there are no other movables subject to his privilege, or if they are not sufficient; unless it be proved that the lessor knew that the things deposited did not belong to his tenant or farmer."

D. Amended versus Unamended Civil Code Articles versus Statute

Now, if the two preceding situations in B and C2 are combined, there is the additional problem that, as between the mechanic and the widow, the code article favors the widow,³⁶ while the statute gives priority to the mechanic.³⁷ Although article 3252 was amended in 1918, the mechanic's lien statute was passed in 1926 (and reenacted in R.S. 1950, 9:4501), and as the later legislation its ranking provision must prevail.

Thus, combining the results of these several conclusions, the four privileges in these vicious circles should be placed in one ranking in the following order: (1) vendor's privilege, (2) mechanic's privilege, (3) widow's homestead privilege, (4) lessor's privilege.

E. Unamended Articles of Civil Code inter se

A very rare conflict arises from exclusively code ranking provisions with the same chronological date marks of 1870 and 1825, with no intervening amendments. Thus, under Civil Code article 3257, funeral charges prime the lessor, while, under article 3263, the vendor yields to the lessor but primes the funeral charges. These are express code solutions for specific privilege rankings, and it must be taken that the redactors of the 1825 Code did not intend to establish a vicious circle in these two simultaneous legislative expressions within the same group of code articles. In conjunction with the rule that special privileges come ahead of general privileges, it must have been their intention to establish the exception that in the presence of the general privilege for funeral charges, the special privilege of the lessor is expressly subordinated, whereas the rule is not disturbed for the vendor. Accordingly, the ranking result would be: (1) vendor, (2) funeral charges, (3) lessor.³⁸

36. *Id.* art. 3252.

37. LA. R.S. 9:4501 (1950), as last amended by La. Acts 1960, No. 31, § 1.

38. The lessor used to have one of the most favored privileges, but times have changed. In more recent years, several statutes and one Civil Code amendment have established certain privileges with ranking provisions which make these privileges yield to the vendor's privilege while they prime the lessor's privilege. See LA. R.S. 3:207 (1950) (agricultural credit corporation); *id.* 9:4501 (garageman); *id.* 9:4502 (repairman); *id.* 9:4862 (oil well equipment); LA. CIVIL CODE art. 3252 (widow's homestead) (1870). Statutory privileges on immovables, likewise yielding to a vendor's privilege, include LA. R.S. 9:4801, 9:4812 (private building contract privileges) (1950); and *id.* 12:756 (loans by receiver of a corporation). Does this disclose a repeated and consistent legislative policy which is reversing the position of the vendor's and lessor's privileges when in

IV.

There are also a number of problems of a more general nature, which are not covered in the preceding discussion and which might involve conflicting ranking provisions.

A. Civil Code Provisions Prior to R.C.C. 1870

In connection with the possibility of a conflict between two ranking provisions of the Civil Code of 1870 *which cannot be resolved or reconciled under any of the techniques already outlined*, it would be proper to go behind the common 1870 date of promulgation. The Civil Code is not an ordinary statute, and in the event of discrepancies between the prior English and French versions of the same article, it has become accepted in Louisiana that the formerly (Civil Code of 1825) official French text of a code article prevails over the corresponding English version.³⁹ This is based upon the acceptance of the Civil Code as a continuing institution; and when there has been no change in the English text, it is proper to resolve the conflict now in the same way that it would have been treated if it had arisen prior to 1870.⁴⁰ Therefore, on the basis of the same reasoning, where one of the irreconcilable code provisions involved in a vicious circle comes from a source which prior to 1870 had a later promulgation date than the other provision in question, the rule of the more recent legislative expression should prevail.⁴¹

B. Statutory Provisions Prior to R.S. 1950

A similar kind of problem may involve two different provisions of the Revised Statutes of 1950. The 1950 revision was not supposed to make any change in the law, and therefore the logical solution after 1950 would be that an irreconcilable conflict between different statutory provisions should be decided in the same manner as it would have been resolved prior to their unchanged incorporation into the 1950 revision, with controlling effect in what had previously been the later legislation. This position is supported by R.S. 1:16, which provides that

competition with these other privileges while not disturbing the ranking of the vendor and lessor by themselves?

39. See Dainow, *The Louisiana Civil Law*, in *CIVIL CODE OF LOUISIANA* xxv (Dainow ed. 1961), and cases cited at xli-xlii.

40. See Dainow, *id.* at xxvi.

41. See *Gee v. Thompson*, 11 La. Ann. 657 (1856); *Lewis Hardware Co. v. Gremillion*, 65 So.2d 807 (La. App. 4th Cir. 1953).

"The Louisiana Revised Statutes of 1950 shall be construed as continuations of and as substitutes for the laws or parts of laws which are revised and consolidated herein," and protected by R.S. 1:12, which expressly precludes any presumption of legislative construction from the arrangement or classification of the compilation.

As a matter of both law and policy, courts always seek a basis of conciliation between any two statutes which disclose a possibility of conflict.⁴² When the two provisions in question are parts of one simultaneous enactment, no pebble is left unturned in this search for any possible conciliation so as to give effect to both.⁴³ Nevertheless, seldom as it might happen, there may well be the situation of two provisions which are irreconcilable.⁴⁴ It is for two such irreconcilable provisions (in one simultaneous enactment) that the solution based on their previous chronological relationship is proposed.⁴⁵

C. Perfectly Equal Legislative Expressions

There still remains the possibility of a vicious circle which is based on perfectly equal legislative expressions and which

42. Cf. SUTHERLAND § 3711; CRAWFORD § 325.

43. See *Chappuis v. Reggie*, 222 La. 35, 43, 62 So.2d 92, 95 (1952); *State ex rel. Fudickar v. Heard*, 223 La. 127, 134-35, 65 So.2d 112, 114-15 (1953); *Collector v. Olvey*, 238 La. 980, 994, 117 So.2d 563, 567 (1959). See also Note, 15 LA. L. REV. 472 (1955).

44. LA. R.S. 9:4501 (1950) creates in favor of a garageman a privilege which is effective for a period of ninety days. If this privilege was on an automobile for motor repairs, the same car could within the same period become subject to another privilege under *id.* 9:4502 in favor of a person who replaced all of the upholstery. Both statutes have exactly the same ranking provision, yielding only to a vendor's privilege and a prior-recorded chattel mortgage and a bona fide purchaser (with certain provisos), but there is no yielding by either one to the other. (The savings clause in § 2 of Act 341 of 1946 (§ 1 of which is La. R.S. 9:4502) to preclude implied repeal of Act 209 of 1926 (La. R.S. 9:4501) does not concern the ranking question.)

Both of these statutory provisions were last amended by the same Act 31 of 1960, and in the event of a conflict between the two, there appears to be no basis for reconciliation. However, La. R.S. 9:4502 had been previously amended by Act 427 of 1952, whereas La. R.S. 9:4501 has only its 1950 enactment date. Accordingly, in the case of an irreconcilable conflict, La. R.S. 9:4502 would prevail.

If there had been no amendments to either of these two statutes since their original enactment, they would have equal legislative status within the Revised Statutes of 1950, but La. R.S. 9:4502 would prevail as having been the later legislation in Act 341 of 1946, whereas La. R.S. 9:4501 came into being as Act 209 of 1926.

45. See *Lewis Hardware Co. v. Gremillion*, 65 So.2d 807 (La. App. 4th Cir. 1953). Cf. *Guillot v. Nunez*, 225 La. 301, 72 So.2d 513 (1954); *Gabriel v. United Theatres, Inc.*, 221 La. 219, 59 So.2d 127 (1952), and critical comments in *The Work of the Louisiana Supreme Court for the 1962-1963 Term — Civil Procedure*, 13 LA. L. REV. 306, at 324 (1953).

does not yield to any of the rules or techniques already mentioned. In such a case, the first reaction is to compromise the impasse by a pro rata distribution. However, by virtue of Civil Code article 21,⁴⁶ it may be in order to reexamine the policy considerations underlying each of the ranking provisions involved and to make a decision by treating the matter as one for which "there is no express law." Where two texts of exactly equal dignity are thus in irreconcilable conflict, there is an "unprovided for" case,⁴⁷ because this kind of an overlap of two conflicting rules is not dissimilar to a gap in the law for which courts must fill in the answer — until the legislature speaks again. According to this analysis, the solution could be an outright ranking among the competing privileges, as well as the more likely pro rata distribution.

V.

It is not feasible, and it would not be useful, to attempt a complete listing of all the actual possibilities of vicious circles in the Louisiana law of privileges. A sufficient number in different categories have been described and resolved to identify the problem and to demonstrate the proposed solution. There is much to be said in favor of the equitable pro rata compromise as a means of *avoiding* the legal issues, but it does not *solve* them. The foregoing discussion and analysis meet the problem squarely and propose solutions, utilizing well-established rules and legal principles, especially the rule of statutory construction that later legislation supersedes earlier enactments emanating from the same authoritative source of law; and the solutions proposed appear to be in accordance with law.

The law-making functions in our system of government are performed by the legislature and the courts. Each has its own area of operation, its own procedure, its own scope, and its own responsibility. The legislature chooses the subjects for which it makes laws, and the legislature also determines how far it goes in providing these laws. The courts do not normally contribute to the formulation of disputes which go into litigation, but they

46. LA. CIVIL CODE art. 21 (1870): "In all civil matters, *where there is no express law*, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." (Emphasis added.)

47. See Dainow, *Method of Legal Development through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 108 (1953).

do have the responsibility of adjudication. Where legislation provides the direct answers or the bases on which solutions can be founded, that is fine. However, where the legislation does not give an answer or the basis for an answer (gap in the law), or where the legislative provisions are in irreconcilable conflict (inconsistent or conflicting overlap), the court must still make a decision — vicious circles included.